STATE OF MICHIGAN

COURT OF APPEALS

MACDONALD LAW OFFICE, PLLC, Plaintiff-Appellant,	UNPUBLISHED June 24, 2010
v	No. 289167 Hillsdale Circuit Court
TED JANSEN and PENNY JANSEN, Defendants-Appellees.	LC No. 08-000624-CK

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Before this Court is an action to enforce a guarantee agreement that was executed by defendants to ensure the payment of attorney fees and costs incurred by Autumn Ellsworth in a child protective services matter. Plaintiff, MacDonald Law Office, PLLC, appeals as of right from an order dismissing its complaint pursuant to MCR 2.116(C)(10) following a scheduling hearing. We reverse and remand.

Defendants solicited plaintiff to represent Ellsworth, a cognitively impaired individual. It is undisputed that defendants signed a written guarantee promising to pay the retainer, fees, and costs incurred by Ellsworth, to the extent that she was unable to do so, in defense of an abuse and neglect petition filed by the Department of Human Services. When the costs and fees reached $5,000, defendants notified plaintiff by letter that they could no longer guarantee any future payment and that they were withdrawing their guarantee. Plaintiff brought the present suit to enforce the guarantee agreement.

On November 10, 2008, a scheduling conference was held on the record. Plaintiff acknowledged that it received defendants' letter, but noted that it disagreed with plaintiff "as to whether or not that would eliminate his responsibility as a guarantor under the agreement, since he had signed the agreement agreeing to be responsible for whatever it wound up being." The trial court, finding that defendants put plaintiff on notice that they would not pay any attorney fees beyond the $5,000 that they had already paid, dismissed plaintiff's complaint.

Under MCR 2.401(C)(1)(*l*), during a pretrial conference, the court may consider any matters that may aid in the disposition of the action. Further, at any time after an action has commenced, if the pleadings show that a party is entitled to judgment as a matter of law, the court must render judgment without delay. MCR 2.116(I)(1). In that regard, if no factual dispute exists, a trial court is required to dismiss an action when a party is entitled to judgment as

a matter of law, and a motion for summary disposition is unnecessary. *Sobiecki v Dep't of Corrections*, 271 Mich App 139, 141; 721 NW2d 229 (2006).

Under Michigan case law, when a contract is unambiguous, it must be enforced according to its terms. *Hamade v Sunoco, Inc*, 271 Mich App 145, 166; 721 NW2d 233 (2006); see also *Phillips v Homer (In re Smith Trust)*, 480 Mich 19, 24; 745 NW2d 754 (2008) (stating that when "contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law").

A guarantee is "[a] promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another who is liable in the first instance." Black's Law Dictionary (8th ed). The guarantor's duty to pay or to perform is collateral to the duty of the primary obligor and only arises upon the obligor's failure to pay the debt. *Mortgage & Contract Co v Linenberg*, 260 Mich 142, 146-147; 244 NW 428 (1932); see also *Bandit Industries, Inc v Hobbs Int'l (After Remand)*, 463 Mich 504, 507 n 4; 620 NW2d 531 (2001). The guarantee signed by defendants provided:

> We, Ted Jansen and Penny Jansen, agree to act as Guarantors for the retainer, fees and costs outlined above, and agree to be legally responsible for the same to the extent that Client is unable to do so. We realize that this will not entitle us to control of litigation, or to be privy to privileged information except as authorized by Client or as is in compliance with HIPAA, the Americans with Disabilities Act, and other, similar, state and federal privacy laws.

The written guarantee does not refer to any limitation on the maximum amount of attorney fees and costs. Plaintiff denied at the scheduling hearing that a verbal agreement was reached regarding such a limitation. The trial court nonetheless found that defendants could legally terminate the guarantee for the payments of attorney fees and costs once such costs exceeded "*the stated amount of the cost of representation*," and that the letter sent by defendants to plaintiff provided notice of termination of the agreement.

A problem exists with this reasoning, however. The trial court completely failed to consider the language of the written guarantee to determine the terms of the parties' agreement.[1] A review of the written guarantee is necessary to determine the terms of the parties' agreement. It was error for the trial court to determine as a matter of law that the letter sent by defendants to plaintiff could extinguish defendants' contractual liability.

Additionally, defendants' letter was based on their assertion that the parties verbally agreed that defendants' guarantee limited their financial liability to $5,000 in attorney fees and costs. Essentially, the trial court relied on parol evidence of an oral contemporaneous agreement

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[1] Although not properly before this Court, the written guarantee is unconditional and unambiguous and provides no limitation on the maximum amount of attorney fees and costs.

in finding that defendants' letter to plaintiff put plaintiff on notice that they would not pay any additional attorney fees and costs and thereby defeated plaintiff's cause of action. Generally, parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a clear, unambiguous contract. *Schmude Oil Co v Omar Operating Co,* 184 Mich App 574, 580; 458 NW2d 659 (1990). "The practical justification for the rule lies in the stability that it gives to written contracts; for otherwise either party might avoid his obligation by testifying that a contemporaneous oral agreement released him from the duties that he had simultaneously assumed in writing." *Hamade,* 271 Mich App at 167, quoting 4 Williston, Contracts, § 631. "In other words, the parol evidence rule addresses the fact that 'disappointed parties will have a great incentive to describe circumstances in ways that escape the explicit terms of their contracts.'" *Id.,* quoting Fried, Contract as Promise (Cambridge: Harvard University Press, 1981) at 60 n 14.

There are, however, exceptions to the rule. First, it is a prerequisite to application of the parol evidence rule that there be a finding that the parties intended the written instrument to be a complete expression of their agreement with regard to the matters covered. *Hamade,* 271 Mich App at 167-168. Where there is no express integration clause, "[p]arol evidence is admissible to establish the full agreement of the parties [to a contract] where the document purporting to express their intent is incomplete." *Greenfield Construction Co, Inc v Detroit,* 66 Mich App 177, 185; 238 NW2d 570 (1975).

Under the circumstances of this case, the trial court prematurely sua sponte granted summary disposition at the scheduling conference. At a minimum, review of the written guarantee is necessary before the trial court can determine whether an ambiguity existed, whether the parties intended the written guarantee to be a complete expression of their agreement, and, if not, whether defendants' parol evidence that plaintiff made representations regarding the maximum legal fees for the year established that the parties intended those representations to be included as a term of their agreement.

Reversed and remanded for further proceedings. Jurisdiction is not retained.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald